

Quarterly Report
OF THE
ATTORNEY GENERAL
OF
ALABAMA



FOR THE PERIOD
FROM JANUARY 1, 1976
THROUGH MARCH 31, 1976

WILLIAM J. BAXLEY, Attorney General

VOLUME 162

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QUARTERLY REPORT

of the

ATTORNEY GENERAL

of

ALABAMA

For the Period

From January 1, 1976

Through March 31, 1976

**TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS
OF ALABAMA:**

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from January 1, 1976 through March 31, 1976, is published in compliance with the provisions of Title 55, Section 228 Code of Alabama, 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State, and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy district attorney of his county. The section also requires that I send a copy of this report to each district attorney and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, County, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

WILLIAM J. BAXLEY

Attorney General

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January 12, 1976

Honorable Walter Owens

Member, House of Representatives

District 48

107 Court Square, West

Centreville, Alabama 35042

Judicial Article—Judges—Officers and Offices

Supernumerary Circuit Judge may serve on Cahawba River Commission.

Opinion by Assistant Attorney General Stephens.

Dear Representative Owens:

In your recent letter you asked whether, in light of the prohibitions contained in the newly adopted Judicial Article of the Constitution of the State of Alabama, Supernumerary Circuit Judge L. S. Moore may serve on the Cahawba River Commission.

It is my opinion that the Judicial Article does not prohibit Judge Moore from serving on the Cahawba River Commission. Section 147 of the Constitution of the State of Alabama provides:

"Sec. 147. Prohibited activities. (a) No judge of any court of this state shall, during his continuance in office, engage in the practice of law or receive any remuneration for his judicial service except the salary and allowance authorized by law.

"(b) **No judge**, except a judge of a probate court, **shall seek or accept any non-judicial elective office, or hold any other office of public trust**, excepting service in the military forces of the state or federal governments.

"(c) The supreme court shall adopt rules of conduct and canons of ethics, not inconsistent with the provisions of this Constitution, for the judges of all courts of this state." (Emphasis added)

The legal questions raised by your request are whether supernumerary judges are included within these prohibitions and whether membership on the Cahawba River Commission is an office of public trust. It is not necessary to address the first of these questions since the second question is answered in the negative.

The Cahawba River Commission was created by Act No. 11 of the Fourth Special Session of the 1975 Legislature of the State of Alabama. The only authority which is granted to the Cahawba River Commission by this act is "to make recommendations and conduct studies pertaining to the environmental impact of any actions or activities on the river" and to "report their activities and recommendations to the Alabama Legislature from time to time." Also, Act No. 11 clearly provides that "the members of the Cahawba River Commission shall not receive any compensation or re-imbursement for any expenses incurred by such members."

However, pursuant to Section 147 (c) the Supreme Court has adopted "Canons of Judicial Ethics" which become effective on February 1, 1976. Canon 5 (G) provides:

"G. Extra-judicial Appointments:

It is desirable that a judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice or unless required by law. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities."

An interpretation of the breadth and application of this judicial canon is peculiarly appropriate for the Supreme Court and it would perhaps be inappropriate and ineffective to issue an Attorney General's opinion interpreting this canon. I suggest that a request for an opinion on the application of this canon should be addressed to the Supreme Court.

You should note, however, that the Supreme Court has ruled that Canon 5 (G) does not apply to a "part-time judge" whom the Court defines to be "a judge who serves on a continuing basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge." As a supernumerary judge, Judge Moore would perhaps be exempt from the restrictions of Canon 5 (G). It is also possible, even if Canon 5 (G) is applicable to Judge Moore, that service on the Cahawba River Commission would be considered service "in connection with historical, educational, and cultural activities" and thus permissible by the terms of Canon 5 (G).

Sincerely,

WILLIAM J. BAXLEY
Attorney General

January 14, 1976

Honorable Jack Bains
Blount County Solicitor
Bains Building
Oneonta, Alabama 35121

Judicial Article-Solicitors-District Attorneys
Transition from county solicitors to assistant district attorneys discussed:

Opinion by Assistant Attorney General Stephens.

Dear Mr. Bains:

In your recent letter you noted that you are currently serving as Blount County Solicitor and that your term expires in January of 1977. You correctly observe that pursuant to the newly adopted Judicial Article of the State Constitution and the recently enacted Judicial Article implementation legislation the office of county solicitor will be abolished and the duties performed by county solicitors will be performed by assistant district attorneys. With respect to the transition from county solicitors to assistant district attorneys you asked whether it is necessary for you to qualify in the Democratic Primary this spring to run for Blount County Solicitor, whether you may continue to practice civil law if you become an assistant district attorney, and when you would be required to file disclosure statements with the State Ethics Commission if you are appointed as an assistant district attorney.

The transition from county solicitors to assistant district attorneys is mandated by Section 4-131 (b) of Act No. 1205, the Judicial Article Implementation Act, and provides as follows:

"County solicitors. On the initiation date of the district court, the functions of the position of county solicitor shall be performed by assistant district attorneys and the office of county solicitor shall be abolished. County solicitors serving terms to which they have been elected prior to the initiation date may elect to become assistant district attorneys for the duration of their electoral terms without diminution of salary or expense payments."

Section 4-101 (a) of Act No. 1205 provides that the initiation date of the district court shall be January 16, 1977. Therefore, on January 16, 1977 the office of county solicitor is abolished. Since the office will be abolished on January 16, 1977 there will be no election for that office in November, 1976 and you, of course, need not qualify in the Democratic Primary to seek that office.

You should note that, since the "grandfather" provision of Section 4-131 (b) provides only that persons serving as county solicitors may elect to become assistant district attorneys for the duration of their electoral terms and since your electoral term expires in January, 1977, you will not automatically become an assistant district attorney upon your election but, rather, you must be appointed by the district attorney.

Your second question concerns whether you might continue to practice civil law if you are appointed assistant district attorney. Title 13, Section 229 (12), Code of Alabama 1940, Recompiled 1958, provides that assistant district attorneys, or deputy solicitors, etc., as they were called when that provision was enacted, cannot practice law in the courts of this state. That provision was apparently intended to apply, and did apply, only to persons employed as full-time assistant district attorneys or deputy solicitors. However, Section 4-131 (c) of Act No. 1205 specifically provides that the district attorney may appoint part-

time assistant district attorneys and, presumably, you contemplate being appointed a part-time assistant district attorney to perform the duties which you have previously performed as county solicitor. It would be illogical and impractical to expect that a part-time assistant district attorney would not practice civil law when not performing his duties as assistant district attorney. Consequently, I am of the opinion that part-time assistant district attorneys may continue to practice civil law.

Your third question as to whether you would be required to file disclosure statements with the State Ethics Commission should be directed to the State Ethics Commission. That Commission is authorized and required by law to issue advisory opinions concerning the State Ethics Law and this office defers to that Commission for opinions on the State Ethics Law.

Sincerely,

WILLIAM J. BAXLEY
Attorney General

January 16, 1976

Honorable J. Rufus Bealle
Vice President, Secretary
and General Counsel
University of Alabama System
Post Office Box BT
University, Alabama 35846

Credit Cards—Colleges and Universities.
University of Alabama System may pay service charge
and accept commercial credit cards.

Opinion by Assistant Attorney General Dunn

Dear Mr. Bealle:

This letter is in response to your request for an opinion on the following issue:

“Whether service charges may be paid by the University in connection with the use of commercial credit cards in lieu of cash for the payment of institutional and auxiliary services provided by the University of Alabama System.”

I am of the opinion that such commercial credit cards may be used by the University System in lieu of cash for payment of such services as are provided by the University to either its students or the general citizenry.

The usual service charge attending the use of commercial credit cards by such entities as the University System is a disconcerting and

somewhat troublesome side issue to the above-stated question. The single most persuasive factor with regard to the payment of the service fees is the legislative delegation of authority to the University of Alabama Board of Trustees to manage and control the University body corporate and to exercise all the rights, powers, and franchises attendant to and promotive of its purposes. Title 52, Sections 486, 487, 488, 490, 491, and 501, Code of Alabama 1940, Recompiled 1958. This legislative delegation complements the separate integrity of the University System and the University Board of Trustees granted in Article 14, Section 264 of the Constitution of Alabama.

Based on the above authorities, it is my opinion that the decision to contract for the payment of commercial credit card service fees is within the discretionary authority of the University System Board of Trustees.

If this office can be of further assistance to you with regard to this matter, please do not hesitate to contact us.

Sincerely,

WILLIAM J. BAXLEY
Attorney General

January 21, 1976

Honorable D. L. Cockrell
Register

Tenth Judicial Circuit
225 Court House
Birmingham, Alabama 35203

Registers—Voters—Absentee Ballots

Absentee voters may physically vote in the office of the Register.

Opinion by Assistant Attorney General Stephens.

Dear Mr. Cockrell:

Your recent letter to this office reads as follows:

“Please refer to Act No. 1147, Regular Session 1975, which provides for and regulates absentee voting and repeals conflicting laws and specifically repealing Act No. 424, H. 351, Regular Session 1949 (Act 1949, page 601) and all Acts amendatory and supplemental thereto.

“Section 10 of Act No. 424, 1949, provides the voter shall mark his ballot and subscribe before the Register or other person designated in the Register’s stead, to the affidavit hereinabove required without departing from the office of the Regis-

ter and without any assistance, unless incapacitated, as prescribed by law.

"Act No. 1147, Regular Session 1975, does not specifically allow an absentee vote to be cast in the office of the Register or before the Register. Section 7 of this Act provides each prospective absentee voter who meets the requirements of this Act shall be furnished with the absentee ballot herein provided for, together with an envelope for returning his marked ballot.

"Such envelope shall be addressed to the Register or other person authorized by law to act in his stead. After marking the ballot and subscribing the oath or affidavit herein required, the voter shall seal his ballot in the envelope provided and may forward it by U. S. mail to the addressee or hand it to him in person.

"Question: Can absentee voters physically vote in the office of the Register?

Absentee voters may physically vote in the office of the Register. The facts that Act No. 1147 repeals a prior provision of law which specifically provides that absentee voters shall mark their ballots before the register and that Act No. 1147 itself does not specifically allow an absentee voter to vote in the presence of the register does not have the effect of preventing or forbidding absentee voters from physically voting in the office of the register. Act 1147 is silent as to where an absentee voter may mark his ballot and, consequently, it must be assumed that an absentee voter can mark his ballot at any place he desires including in the office of the register. The provision of Act 1147 which states that the absentee voter may hand his ballot to the register in person suggests that Act 1147 contemplates absentee voters physically voting in the office of the register.

Sincerely,

WILLIAM J. BAXLEY
Attorney General

January 22, 1976

Honorable Jack W. Smith
Representative
District 73

124 South Oates
Dothan, Alabama 36301

Youth Offenders—Sentences

The Youthful Offender Act does limit the total sentence to three years, but to three years in respect to each separate offense.

Opinion by Assistant Attorney General Sykes

Dear Sir:

I have your inquiry under date of December 30, 1975 as follows:

"It has come to my attention that under Chapter 11A, Youthful Offenders, Title 15, Section 266, Subsection 1 through 6, Code of Alabama, that there has been a case in Ozark whereby the Court sentenced David Powell to two consecutive sentences under the Youthful Offender Act. He was given three years on one charge and two years on an additional charge, which made a total of five years. At the time David Powell was sentenced I discussed this matter with the Assistant District Attorney, William B. Matthews. He told me that in his opinion that all he could receive under that Act was three years but that he wanted to give him two sentences anyway. This was a plea-bargain situation and I represented David Powell and felt at the time that it was to his best interest to receive the sentence rather than go to trial.

"I have discussed this matter with the members of the Pardon and Parole Board and they have advised me that they will abide by the Attorney General's ruling. That if three years is the maximum that the Attorney General feels that the Court can give under the Youthful Offender Act, then they will treat the matter for parole purposes as if he has only three years. Please give me an Attorney General opinion in regards to this Act.

"Under Title 15, Section 266, Subsection 4, which is entitled Disposition of Youthful Offender, lists the disposition as (a), (b), (c) and (d). D states as follows:—'**Commit the defendant to the custody of the director of the department of correction for a term of three years or a lesser term.**' There is further authority for imposing an additional \$1000.00 fine. At the time David Powell was sentenced twice, the real purpose was to be able to fine him \$1000.00 on both counts. We have no objection to paying the \$2000.00 fine and we are not directly asking for a ruling in regard to the fines. We do feel that three years is all the Court has the authority to give him and I thought that at the time that he was sentenced, but his case and the evidence against him was such that I felt that it would be to his best interest to accept the sentence as imposed at that time."

In addition to the facts stated in the inquiry, the person making the inquiry states that the defendant in question was and is represented by him as an attorney during the court proceedings; that defendant was separately for, 1. sale of L.S.D. and, 2. possession of marijuana; that the offense occurred at approximately the same time, there being an arrest for sale of L.S.D. followed by a later search of defendant's vehicle where marijuana or other controlled substances were found; defendant pleaded guilty to each offense.

In my opinion, the trial court is empowered to, "(d) commit the defendant to the custody of the director of the department of correction for a term of three years or a lesser term," in respect to each separate offense or charge. Therefore, the defendant's sentence in the case put by your inquiry totals 5 years.

There is nothing in the Youth Offender Act, Act No. 335, Acts 1971, p. 4622 (Title 15, Section 266(1) et seq, Code of Alabama, Re-compiled 1958, 1973 Cumulative Pocket Part) which restricts the trial court from treating an offender who commits successive offenses, as a youthful offender for the first and each successive offense. Perhaps on the second or third offense, the trial court in its discretion would probably not grant youthful offender treatment, but in this case the trial court has chosen to do so.

Apparently, defense, the court and the prosecution were satisfied with the results of the plea bargaining and this office is not inclined, even if it had the authority, to challenge circuit court sentences based on guilty pleas.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

January 30, 1976

Honorable T. Raiford Noland
Vice President for Business Affairs
Livingston University
Livingston, Alabama 35470

Bids—Colleges and Universities.

Livingston University is not governed by Act No. 1136, infra, which raises the minimum requirement for competitive bidding on certain contracts to \$2,000.00.

Opinion by Assistant Attorney General Lawley.

Dear Sir:

This letter is in response to your letter of recent date which discussed Act No. 1136, Acts of Alabama, 1975 Regular Session. This act amends the competitive bid law found in Title 55, Chapter 22, Code of Alabama 1940, Recompiled 1958, 1973 Cumulative Supplement, by raising the minimum requirement for taking competitive bids to contracts involving \$2,000.00 or more. Your question is whether Livingston University is governed by the provisions of Act No. 1136. Your question is answered in the negative.

Act No. 1136, Section 1, states in pertinent part:

"All expenditure of funds of whatever nature for labor, services, or work, or for the purchase or lease of materials, equip-

ment, supplies or other personal property, involving two thousand dollars (\$2,000.00) or more, made by or on behalf of any state trade school, state junior college, **state college or university under the supervision and control of the State Board of Education . . .** shall be made under contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder; . . ." (Emphasis added)

Thus, Act No. 1136 only applies to colleges and universities which are under the supervision and control of the State Board of Education.

Act No. 424, Acts of Alabama, 1967 Regular Session, page 1092, created a board of trustees to manage and control Livingston University. Therefore, it is my opinion that Livingston University does not fall within the provisions of Act No. 1136 and remains subject to the competitive bid law applicable to state institutions found in Title 55, Chapter 21, Code of Alabama 1940, Recompiled 1958, 1973 Cumulative Supplement.

If this office may be of any further assistance to you in this matter, please let us know.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

February 12, 1976

Honorable William W. Rayburn
District Attorney
16th Judicial Circuit
Etowah County Courthouse
Gadsden, Alabama 35901

Divorce/Nonsupport
District Attorney—
Authority in divorce, non-support actions

Opinion by Assistant Attorney General LaBahn

Dear Mr. Rayburn:

Before me is your recent letter containing the following request for the opinion of the Attorney General:

"I need your opinion as to whether a State District Attorney has the authority under Title 13, Section 229, 229 (1), 229 (2) or any other possible legal authority, to perform legal services as shown on page 2, 1 C (4) i.e. legal action to have a divorce order amended in regard to child support. Further on page 3, III B(1) i.e. the filing of contempt proceedings

to enforce court orders in divorce proceedings and (2) filing garnishment of obligor's wages in attempts to collect support.

Of course, these legal actions are done by our office under Title 34, Sections 105 through 123 of the Code of Alabama (commonly referred to as Reciprocal non-support cases). Can we now extend these non-support statutes so as to include our authority to render legal services in civil divorce proceedings within our Judicial Circuits in the State of Alabama."

It is my opinion that your office has the authority to perform the legal services described in your proposed Memorandum of Understanding. This opinion is derived from Title 13, Section 229, Code of Alabama 1940, Recompiled 1958, wherein it is stated that among the duties and powers of circuit solicitors is the authority "to prosecute and defend any civil action in circuit court in the prosecution or defense of which the state is interested."

42 U.S.C.A. §602(a) 26 requires as a condition for eligibility for aid to needy families which children that each applicant or recipient assign to the State any rights to support from any other person that the applicant may have in his behalf of any other family member for which the applicant is applying for or receiving aid and which have accrued at the time of the assignment. As you know, recent amendments to the Social Security Act, found in Title IV-D (P.L. 93-647, 42 U.S.C.A. §§651-660) state that the assignment of support rights to the State made under 42 U.S.C.A. §602(a)26 "shall constitute an obligation owed to such state by the person responsible for providing such support. Such obligation shall be deemed for collection purposes to be collectible under all applicable state and local processes." 42 U.S.C.A. §656(a).

In addition, Section 458 of the Act (42 U.S.C.A. §658) authorizes incentive payments to states and localities for the enforcement and collection of support rights under Title IV-D.

To the extent, then, that the above federal statute gives the state an interest in the collection of support payments assigned to it pursuant to Title IV-D, it is my opinion that Title 13, Section 229, Code of Alabama 1940, Recompiled 1958, would authorize you to defend and secure that interest in civil proceedings such as you outline in your letter.

I trust that you will find this to be an adequate response to your question. If I can be of further assistance, please do not hesitate to call upon me.

Yours very truly,

WILLIAM J. BAXLEY
Attorney General

February 18, 1976

Honorable William H. Lumpkin, Judge
Cherokee County Court
Cherokee County
Centre, Alabama 35960

Youthful Offenders
County Courts
Youthful Offender Act does not apply in County Courts.

Opinion by Assistant Attorney General Lett.

Dear Judge Lumpkin:

I have your letter of 18 December 1975 wherein you pose the following questions regarding the applicability of the Youthful Offender Act [Title 5, §266 Code of Alabama 1940, as Recompiled 1958 (1973 Cumulative Supplement)] to the Cherokee County Court:

"1. Does the Cherokee County Court, whose criminal jurisdiction is limited to non jury trials of misdemeanor offenses, have the authority to apply the provisions of the Youthful Offender Act in cases initiated in that Court by affidavit or complaint and not by indictment or information?

2. Under the Youthful Offender Act may the judge of a county court which has no jury trial jurisdiction legally accept from a youthful offender a waiver of his right to trial by jury when such right is vested in a circuit court?

3. Would your answer to either of the above questions be affected by the fact that Act. No. 479, *ibid.*, provides that appeals from non jury trials, if no appeal is taken to the Cherokee County Circuit Court for *de novo* trial by a jury, may be taken from the orders and judgments of the Cherokee County Court to the appropriate appellate court of the State of Alabama in the same manner and within the circuit courts of the State of Alabama?"

All three questions must be answered in the negative. The Youthful Offender Act may not be applied in county courts. The reason for this answer may be found in the language of Section 266 (1) which emphasizes that if certain preconditions are met, " . . . no further action shall be taken on the indictment or information . . ." This indicates that the legislature intended that act apply only to proceedings instituted in the circuit courts throughout this state. See also, the opinion of Assistant Attorney General Bernard Sykes ("Quarterly Reports of the Attorney General" for the period of 1 January 1975-31 March 1975, Volume 158, page 20) holding that Youthful Offender Act does not apply in municipal courts for the same reason.

Very truly yours,
WILLIAM J. BAXLEY
Attorney General

February 23, 1976

Honorable M. S. Butler
Sheriff

Montgomery County
Post Office Drawer 4219
Montgomery, Alabama 36104

Sheriffs—Courts

Computation of time under Alabama Rules of Court—
Applicability of Rule 6(a) to specific statutory time
periods.

Opinion by Assistant Attorney General Dillard.

Dear Sheriff Butler:

Your request for an official opinion bearing date of February 2, 1976, reads as follows:

Section 38 of Title 31 of the Code of Alabama as re-compiled in 1958 reads as follows:

“‘§ 38. Service of writ.—It shall be the duty of the officer in whose hands the writ or process provided by section 36 of this title may be placed to serve a copy of same at once on the defendant, together with notice that after the expiration of three days (not counting Sundays or legal holidays) said officer will proceed with the execution of such writ or process; it is sufficient to leave a copy of said writ or process and of said notice at the defendant's usual place of abode; and unless a counter affidavit as provided by section 37 of this title, is filed with said officer within that time, it shall then be his duty to proceed forthwith to execute said writ of process.’

“Section 920 of Title 7 of the Code of Alabama as recompiled in 1958 reads as follows:

“‘§ 920. Provisions for delivery of property to parties.—If the defendant neglect for five days to give such bond, the property sued for must be delivered to the plaintiff, on his giving bond with sufficient surety in double the value of the property, payable to the defendant with condition to deliver the property to the defendant within thirty days after judgment, in case he fail in the suit, and to pay all damages for the detention of the property and costs of suit. If the plaintiff fail to give such bond for five days after the expiration of the time allowed the defendant, the property must be returned to the defendant.’

“Rule 6 (a) of the Alabama Rules of Court reads in part as follows:

“(a) Computation.—In computing any period of time prescribed or allowed by these rules, by the local rules of any circuit court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation . . .”

“Is this rule applicable to the code sections above referred to, and does it mean that Saturdays, Sundays and legal holidays would be excluded in computing the time as provided in either or both of the above quoted code sections?”

The Alabama Rules of Court govern procedure in the Circuit Courts, and in Courts of full, like jurisdiction, and in all other Courts where appeals lie directly to the Supreme Court or Court of Civil Appeals, and in all suits of a civil nature, whether at law or in equity, except the Probate Courts and proceedings enumerated in Rule 81.

Rule 1, Alabama Rules of Court.

The provisions set out in your request shall within the scope of these rules, and are, therefore, “applicable statutes,” as that term is used in Rule 6(a). The Committee Comments to Rule 6 clearly establish that the Rule alters Title 1, Section 12, **Code of Alabama** 1940, Recompiled 1958, to include Saturdays within the class of days properly excluded at the end of a statutory time period. The Committee Comments state specifically that “Rule 6(a) on computation of time is expressly applicable to time periods fixed, among other things, ‘by any applicable statute.’”

It is my opinion, therefore, that Rule 6(a) governs the computation of time under Title 31, Section 38, and Title 7, Section 920 of the **Code of Alabama** 1940, Recompiled 1958. Be advised that where the statutory time periods set out in your request expire on a Saturday, Sunday or legal holiday, such days must be excluded from the computation of time. Be further advised that “intermediate Saturdays, Sundays and legal holidays” must also be excluded where the statutory time period is less than seven days.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

March 1, 1976

Dr. Wayne Teague
State Superintendent of Education
State Office Building
Montgomery, Alabama 36130

Boards of Education—School Fees—
State Department of Education.

Monies appropriated pursuant to Section 3S (d) of Act 129, 1975 Fourth Special Session of the Legislature, shall not be allocated to any local school system which has collected unauthorized fees during the 1975-76 school year.

Opinion by Assistant Attorney General Middleton.

Dear Dr. Teague:

This office has received your February 11 request for an interpretation of Section 3S (d) of Act 129, 1975 Fourth Special Session of the Legislature of Alabama. You have asked the following specific questions concerning that provision:

1. Should a school system that has collected fees in courses required for graduation refund such fees to those who paid them?
2. If such fees as referred to in number 1 are not refunded, should the school system be allowed to use funds appropriated to replace fees?
3. The State Department of Education has the responsibility of disbursing the funds to replace fees. What do you perceive the responsibility of the State Department of Education in caring out the intent of the Legislature?

With regard to your first two questions, it is apparent on the face of Section 3S (d) that the appropriation referred to therein was made by the Legislature for the sole purpose of providing the public schools of this state with sufficient funds to replace revenues which otherwise would have been obtained through the collection of certain school fees. Section 3S (d) does not contemplate that a local school system may both continue to collect fees and receive an additional appropriation designed to take the place of these fees. Consequently, it is the opinion of this office that a school system which has collected fees during the 1975-76 school year in courses required for graduation must either refund such fees to those who paid them, or if such fees are not refunded, should be prohibited from receiving and using the funds appropriated to replace said fees.

This same rule applies not only to fees collected in courses required for graduation, but to fees collected in any other areas specifically prohibited by statute. For a list of the conditions which must be met

under relevant Alabama statutory law for a fee to be charged during the 1975-76 school year, I refer you to Opinion to Mr. J. Revis Hall, Superintendent of the Jefferson County Board of Education, under date of December 29, 1975, a copy of which is attached hereto for your information and use.

Answering question number 3, in our view it is the responsibility of the State Department of Education in carrying out the intent of the Legislature to take the following steps as expeditiously as possible: (1) The State Department of Education must furnish guidelines to each local board of education in the state consistent with the attached opinion to Mr. Hall indicating those areas in which fees may or may not be charged pursuant to applicable Alabama statutes. (2) Together with the furnishing of these guidelines, the State Department of Education shall notify each local board of education that if any unauthorized fees have been collected during the 1975-76 school year, such fees must either be refunded to those who paid them or no further disbursements from the 3S(d) appropriation will be forthcoming, and, in addition, those disbursements which have already been received to date must be refunded to the State Department of Education. (3) In accordance with these guidelines and instructions, the State Department of Education shall withhold the disbursement to a local school system of any further monies appropriated pursuant to Section 3S(d) until adequate proof is furnished that no unauthorized fees were collected in said system, or that any such fees collected have been refunded. Such proof must be personally verified by the local superintendent or other relevant school official. If fees collected are not refunded by a local school system, the State Department of Education shall then proceed to take necessary steps to insure that all monies previously distributed to such school system pursuant to Section 3S(d) are re-mitted to the Department.

As you are aware, the issues which have been discussed in this opinion are also issues in the case of **Baxley v. Rutland**, United States District Court for the Middle District of Alabama, Civil Action No. 75-90-S, in which you are a party defendant. It is my understanding, however, that the attorney who represents you in that action has requested or authorized you to submit this opinion request to us.

You should also be aware that this opinion represents an interpretation of Act 129 and other relevant Alabama statutes concerning school fees, only. As reflected in our complaint in the **Baxley v. Rutland** case, it is also the opinion of this office that the collection of any fee in the public schools of this state is unconstitutional and unlawful even in those limited areas which the Alabama statutes purport to allow.

I hope that this letter has sufficiently answered your inquiry. If you have any further questions on this or any other related matter, please do not hesitate to let me know.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

March 5, 1976

Honorable Charles A. Graddick
District Attorney
Thirteenth Judicial Circuit
Courthouse
Mobile, Alabama 36601

**SEARCHES AND SEIZURES—
DISTRICT ATTORNEYS**

A district attorney is authorized to file proceedings in the circuit court to determine the title and disposition of money or currency in his possession, seized during an inventory search of an automobile after the arrest and conviction of a passenger and driver for possession of untaxed alcoholic beverages, and other offenses in a municipal court.

Opinion by Assistant Attorney General Sykes.

Dear Mr. Graddick:

I have your request for an opinion as follows:

"An interesting and unusual fact situation has arisen that I feel has required my requesting of your office to render an Attorney General's Advisory Opinion.

"Beginning in the latter part of the spring and continuing through the summer, a narcotic "under-cover operation began in northern Mobile County, specifically Citronelle, Alabama. Involved in this under-cover operation was the Enforcement Division, Alabama ABC Board, Citronelle Police Department and advice and aid was rendered by the Mobile County District Attorney's Office. Money for that operation was partly derived from the District Attorney of Mobile County furnishing funds from the Solicitors Fund.

"Specifically, on August 7, 1974 at approximately 5:10 p.m. on Highway 45, Citronelle, Alabama agent Richard Nixon, Enforcement Division, Alabama ABC Board assisted by under-cover agent J. D. Burchett and ABC Agent Greg Andress and Citronelle Police Department Officer Joe Sellers stopped a 1966 Buick 4-door Sedan bearing Mississippi License tag number 535-CCH. The stopping of this vehicle was done only after receiving information from what appears to be a reliable informant that this particular vehicle would be transporting numerous pounds of Marijuana through Citronelle. The driver of the vehicle was a white female, name—Rebecca Ann Brown, D.O.B. 9/10/55, residence 3111 West Lake Drive, Meridian, Miss. She also goes by an alias "Ann Brown". A passenger in the vehicle was a white male, name — James Rory Dawkins D.O.B., 11/7/50, residence Box 4, Bailey, Mississippi.

"After stopping the vehicle having 'probable cause' to do so, the agents and police officers saw in plain view a number of beer cans which were not properly stamped by the State of Alabama. The occupants of the vehicle were placed under arrest for possession of untaxed beer and taken to the docket room of the Citronelle Police Station. An inventory of the vehicle revealed the following contraband: 37 pounds of Marijuana contained in 18-blocks in two bags (one-duffel; one-garbage bag in trunk) one pipe with residue in the purse of the female defendant, one set of scales in the trunk, one .22 caliber revolver, one .25 automatic pistol and a tackle box in the trunk containing \$4,140.00 in United States currency.

"The defendant Dawkins after having been read his Miranda warnings apparently freely admitted to possessing the 37 lbs. of Marijuana, pistols and nothing else. The female defendant, Brown admitted to possessing the pipe which contained residue.

"On August 14, 1974, it appears that a more exhaustive search was made of the tackle box and approximately one and one half gram of Cocaine was found in a plastic packet. The male subject was then arrested and charged with the possession of Cocaine.

"It appears from court records of the Citronelle Municipal Court that the two individuals charged on the various violations had their cases disposed of. The following are dispositions of the cases. On August 15, 1974 Rebecca Ann Brown was found guilty of possession of Marijuana and fined \$200.00 and cost; possession of narcotic paraphernalia, found guilty and fined \$200.00 and cost; possession of untaxed whiskey, found guilty and fined \$200.00 and cost; carrying a concealed weapon, found guilty and fined \$200.00 and cost; no pistol permit, found guilty and fined \$200.00 and cost. She paid all fines and cost and was released.

"On August 16, 1974 the defendant, James Rory Dawkins appeared in court and was found guilty of 'possession of controlled substances' and fined \$200.00 and cost; possession of untaxed whiskey, found guilty and fined \$200.00 and cost; Carrying a concealed weapon, found guilty and fined \$200.00 and cost; no pistol permit, found guilty and fined \$200.00 and cost. This defendant was then subsequently released from custody.

"In May, 1975, it was brought to my attention that Agent Richard Nixon, Enforcement Division, ABC Board was discharged from that agency for obtaining witness fees in Washington County in violation of office policy. It was also discussed at that time that Agent Nixon had apparently retained custody of the previously mentioned \$4,140.00 in United States currency.

"Mike Judge, the Mobile supervisor of the Enforcement Division of the ABC Board, explained to me that when the money was found in the vehicle that neither the driver, Ann Brown nor the passenger and owner of the tackle box where the money was found, Dawkins claimed either knowledge of the money being there or ownership of said money. A diligent effort has been exerted on the part of the ABC Board to establish the ownership of said money, but have been unable to do so. Judge went on to say that his office had contacted the Intelligence Division of the Internal Revenue Service in Mobile and asked for their assistance to establish ownership of said money. Apparently, the IRS made some effort to establish ownership; however, they communicated the fact back to Mike Judge that they did not wish to levy on said money nor further assist in attempting to find the true owner. Apparently, the Internal Revenue Service action was dictated by a policy in their office from Washington, D.C.

"Mike Judge then requested Richard Nixon to come to my office and deliver a cashiers check in the amount of \$4,140.00 payable to this office and sign an affidavit stating that this check represented the money which came from the trunk of the automobile previously discussed and that they no longer wished to have any responsibility for said money.

"My office has deposited this particular money in a trust account in a bank in Mobile and now wishes to make some final disposition of it. No further criminal prosecutions will be instituted against either of the individuals previously named nor anyone else involved in this particular fact situation. It appears that no one claims any ownership to the money seized in this particular arrest. That brings me to the point "of which this particular request is based. That being: can the Mobile County District Attorney institute proceedings to condemn this money (\$4,140.00) to the Mobile County District Attorney's Solicitors Fund for the use of law enforcement purposes and the enforcement of State Penal Laws? If the answer to that question is yes, then I would further inquire as to what the appropriate procedure (sic) would be to follow in order to condemn said money and/or what authority this procedure (sic) could be instituted thereunder.

"I think it goes without saying that this office certainly could use said funds for law enforcement operations, specifically narcotic under-cover operations and under-cover operations involving Casino-styled gambling operations based in the oM-bile area. Mobile is plagued with a crippling narcotic and gambling situation and without a doubt these monies would go for a very useful purpose.

"If there are any other details or information required by you please do not hesitate in contacting me."

Your inquiry involves the disposition of property, here currency, which was seized by an officer attendant to the search of a vehicle. Apparently this search was an inventory search of the vehicle after arrest of the driver and passenger for possession of untaxed alcoholic beverages, and on the further grounds of probable cause that the vehicle was transporting marijuana.

Such inventory searches have been upheld in Alabama. **Jackson v. State**, 7 Div. 341, Court of Criminal Appeals, Ms. May 6, 1975; **Stiles v. State**, 8 Div. 624, Court of Criminal Appeals, Ms. June 30, 1975; See **Chambers v. Maroney**, 399 U.S. 42. While the seizing officer was justified in seizing the money found in the same auto trunk and tackle box containing a controlled substance as "mere evidence" of the commission of an offense, (**Warden, Maryland Penitentiary v. Hayden**, 387 U.S. 294) this money was apparently not offered in evidence, nor was there a relevant conviction for selling, but possession only.

The seized currency was not taken under the authority of a search warrant not is there any showing that the money was stolen or embezzled. Therefore, Title 15, Section 113, Code of Alabama, Recompiled, 1958 does not operate to require the magistrate to return the property to the owner on proof of title. When this Section is not applicable, apparently a court having jurisdiction to decide controversies concerning title to property may be invoked in a civil action. **Southern Hardware Co. v. Lester**, 166 Ala. 86, 52 So. 328. Neither does the Controlled Substances Act direct the forfeiture and disposition of such money. Title 22, Section 258 (57) Code of Alabama, Recompiled 1958, 1973 Cumulative Supplement; Act No. 1407, p. 2398, Acts 1971, Section 504.

It is my opinion, therefore, that the District Attorney, now in possession of the property, or having the funds in a depository, may file a petition in the circuit court, averring the facts as stated in your inquiry and praying that the court direct the disposition of the funds.

It is further my opinion that the defendant from whose tackle box the money was seized should be given notice of such proceedings and if possible be made a party defendant.

This opinion, of course, does not decide the question of title but simply answers your question to the extent that we agree that the district attorney should file a proceeding to determine the disposition of the funds. Such proceedings would not, in my opinion, be to condemn the funds but to request a determination of their proper disposition. In such proceedings, the district attorney certainly could advance his contention that the funds should be paid into the District Attorney's Fund.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

March 15, 1976

Mr. Clarence Nance
Chairman, Board of Registrars
Madison County
Huntsville, Alabama 35801

Boards of Registrars—Voter Registration-Residence
Criteria for determining college student's right to register
to vote must be the same as the criteria used for other
citizens.

Opinion by Assistant Attorney General Stephens.

Dear Mr. Nance:

In your recent letter you inquired about the residency required for college students to be entitled to register to vote in this state. You correctly noted that the courts have held our durational residency requirements to be unconstitutional and invalid. There is, therefore, no durational residency requirement in the State of Alabama. While the courts have held that a thirty-day residency requirement may be constitutionally imposed by law, there is no such residency requirement imposed by law in the State of Alabama.

In this connection you asked the following questions:

- "1. What is now the primary guideline for registering students?
- "2. Does dormitory residence limit an applicant's freedom of choice of a voting residence?
- "3. Does living in a dormitory on an Alabama college or university campus constitute owning or renting living space in the community?"

The residency requirement for students is the same as the residency requirement for any other citizen. The significance of the court decisions dealing with student registration is that students may not be discriminated against or treated differently merely because of their status as students. In other words, the same criteria must be applied to determining a student's right to register as would be applied to determining any other citizen's right to register.

Since there is no durational residency requirement in the State of Alabama now, the only residency requirement is that the student be a resident at the time he makes application for registration. Dormitory residence does not limit an applicant's registration right and living in a dormitory on a college or university campus does not constitute owning or renting living space in the community in the same manner that renting a room or an apartment elsewhere in the city would constitute owning or renting living space in the community.

I hope and trust that this sufficiently answers your question.

Sincerely,

WILLIAM J. BAXLEY
Attorney General

March 18, 1976

Helen C. Parks, Chairman
Macon County Boards of Registrars
Tuskegee, Alabama 36083

Board of Registrars—

Place of Voter Registration—

Voters can only register at the County Courthouse or in the precinct in which they reside. Board of Registrars has duty to go to each precinct in the county for purpose of voter registration, but may designate the location within that precinct for said registration. Title 17, §26 and §28, Code of Alabama 1940 (Recomp. 1958).

Opinion by Assistant Attorney General Ward

Dear Mrs. Parks:

This is to acknowledge receipt of your letter of February 3, 1976 in which you requested an opinion as to whether the Macon County Boards of Registrars, pursuant to Title 17, §28, Code of Alabama 1940 (Recomp. 1958) would be required to leave the courthouse and register voters in the precinct in which they reside. The answer to your question is as follows:

The Alabama election laws provide, Title 17, §28, Code of Alabama 1940 (Recomp. 1958) that:

"No person shall be registered except at the court house or in the precinct or ward where he or she resides."

In my opinion this does not mean that the Boards of Registrars has a choice to register voters either in the courthouse or the precinct where they reside. Rather, this statute mandates that a person must register to vote in the precinct in which he or she lives, and none other, or the courthouse, regardless of the precinct where it is located.

This conclusion is supported by another portion of the Alabama election laws, that being Title 17, §26, Code of Alabama 1940(Recom. 1958). This section dictates that the Board of Registrars shall visit each precinct in the county during certain periods of time; that the purpose of these visits is to be the complete registration of voters in that precinct; and that notice at least twenty days before the time for registration must be given, including the place in the precinct where applicants will be registered.

This section makes it quite clear that the Board of Registrars has a duty to go to the various precincts to register voters and not a choice of whether to go or stay at the courthouse for that purpose. Once at the precinct, the specific place for voter registration can be designated by the Board.

Therefore, applying these statutes and interpretations to the situation you describe, the following conclusions are reached:

(1) If Tuskegee Institute is in a precinct different from that of the courthouse, then the Board must go to that precinct to register those who reside there, i.e. reside at Tuskegee Institute. Although the Board has discretion to designate the place within the precinct for registration, it would seem that Tuskegee Institute would be a convenient and logical location for such a purpose.

(2) If Tuskegee Institute is in the same precinct as the courthouse, the Board could designate the courthouse as the registration location for those who reside at the school. However, for reasons of convenience and increased participation in the electoral process, it would seem that Tuskegee Institute would be a logical alternative or additional location to the courthouse for the purpose of voter registration.

I trust this satisfactorily answers your question. If I can be of any future assistance, do not hesitate to let me know.

Sincerely,

WILLIAM J. BAXLEY
Attorney General

March 31, 1976

Honorable D. L. Cockrell
Register
Tenth Judicial Circuit
225 Court House
Birmingham, Alabama 35203

Absentee Ballots—Boards of Registrars—Elections
Prospective absentee voter must make application for each election, including primary and runoff primary, in which he wishes to vote absentee.

Opinion by Assistant Attorney General Stephens

Dear Mr. Cockrell:

In your recent letter you noted that the prior provisions of Alabama law governing absentee voting have been repealed and replaced by Act No. 1147 of the 1975 Regular Session of the Alabama Legislature. With respect to the new absentee voting law your letter made the following request:

" . . . it is respectfully requested that you give your opinion as to whether the application of each applicant who will ask for and obtain an absentee ballot in the May 4, 1976, Primary, is considered as making an application for the May 25, 1976, Run-off Primary, or should said voter send in another signed application for an absentee ballot for the May 25, 1976, Run-off Primary."

It is my opinion that an application for an absentee ballot for the May 4, 1976 Primary should not be automatically considered as an application for the May 25, 1976 Runoff Primary. As your letter also noted, the last sentence of Section 3 of Act No. 1147 provides:

“It shall be necessary for each prospective absentee voter to make application for an absentee ballot for each election in which he proposed to vote an absentee ballot.”

Under the previous provisions of law which governed absentee voting in this state an application to vote absentee in the Primary Election was also considered an application to vote absentee in the Runoff Primary for those persons entitled to vote absentee by mail. See Quarterly Report of Attorney General, Vol. 123, page 25. However, the enactment of Act No. 1147 and the explicit direction of that act has substantially changed the procedures for absentee voting in this state including the procedures for applying for absentee ballots for the Primary and for the Runoff Elections.

Sincerely,

WILLIAM J. BAXLEY
Attorney General

INFORMAL OPINIONS

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